IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Custom Act Appeal No.1 of 2006
Date of decision:7.11.2006

The Commissioner of Customs, Commissionerate, The Mall, Amritsar

....Appellant

versus

M/s. Parker Industries, Jalandhar

....Respondent

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL
HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. MS Guglani, Central Govt. counsel for the appellant.

Mr. Jagmohan Bansal, Advocate, for the respondent.

JUDGMENT:

This order will dispose of Custom Act Appeal Nos. 1 to 5 of 2006, as common questions of facts and law are involved between the same parties. Facts have been noticed from Custom Act Appeal No.1 of 2006.

This appeal has been preferred by the revenue against the order dated 7.2.2005 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for short, 'the Tribunal') in C/Stay 2921-2925/04-NB (S) in A.No.C/638-42/04-NB(S), proposing following questions of law:-

> "i) Whether the CESTAT is justified in applying ratio of the law laid down by the Bombay High Court in the case of Taparia Overseas (P) Limited v. UOI reported as 2003 (161) ELT 47 (Bom.) for granting relief upon penalty, to original DEPB holder who committed fraud without distinguishing the fact that in the case of Taparia Overseas Hon'ble Bombay High Court decided the matter in respect of beneficiary of the DEPB i.e., to whom forged DEPB was transferred by the original DEPB

holder?

(ii) Whether the CESTAT is justified in allowing same treatment to the committee of the fraud and beneficiary of the DEPB who purchased it in bonafide manner?

(iii) Whether the CESTAT is justified in absolving the Respondents i.e., original holder of the DEPB, who obtained it by fraudulent means and then transferred it, holding that the licences were valid at the time of import ignoring the fact that the penalty was imposed in fitness to malafide acts of the respondents?

(iv) Is it not that the CESTAT order is not speaking in nature? The order has been passed at the stage of hearing the stay application, without discussing merits of the case of the Revenue as brought forward in the show cause notice and discussed in the Order-in-Original, on the basis of facts of the case?"

Case of the revenue is that the assessee forged Bank Certificate of Exports and Realization (BCE&R) with a view to avail benefits under Duty Entitlement Pass Books (DEPB) under which an exporter is entitled to duty exemption. When the fraud committed came to light, the Joint Director General of Foreign Trade (JDGFT) cancelled the DEPBs issued in favour of the respondent vide order dated 16.1.2002.The assessee transferred one of the DEPBs to M/s. Shiraj International Company, Amritsar, who effected imports on that basis. Though, proceedings were initiated against M/s. Shiraj International Company, but no penalty was imposed as their plea that they were bonafide transferee of DEPBs for consideration,without notice of any allegation of fraud, was accepted. Finding recorded by the adjudicating authority in its order dated 28.4.2004 is as under:-

"However, I find nothing on record to infer that M/s. Shiraj International Co.Amritsar had purchased the freely transferable DEPB scrip otherwise than in a bonafide manner and utilized the same towards debit/exemption of duty and there is nothing to suggest of his having colluded with the exporter who obtained the DEPB scrips by fraudulent manner. Therefore, I do not hold them liable to penal action under section 112 of

the Customs Act, 1962."

However, duty was directed to be recovered and penalty was imposed on the respondent-assessee.

On appeal to the Tribunal accepted the plea of the assessee that since penalty was not imposed on the importer for importing goods against invalid DEPBs, no penalty could be imposed on the assessee-respondent and that the licence was valid till cancellation.

Learned counsel for the revenue submitted that the Tribunal was in error in treating the case of the respondent, who was guilty of forging BCE&R and thereby illegally securing DEPB. which was transferred to M/s. Shiraj International Company Limited which led to illegal import at par with M/s. Shiraj International Company (transferee of the DEPB). The transferee may be acting bonafide without notice of the fraud and may not be liable to penalty but the respondent who committed the fraud could not be treated at par and is liable to penal action.

Learned counsel for the assessee relied upon judgments of the Hon'ble Supreme Court in East India Commercial Company limited v. Collector, 1983 (13) ELT 1342 (SC), wherein it was held that even if a licence was void on account of fraud, this did not affect rights of a transferee unless the transferee had not acted bonafide. Reliance was also placed on judgments of the Hon'ble Supreme Court in **Collector of Customs, Bombay v. Sneha Sales Corporation,** 2000 (121) ELT 577 (SC) and **UOI v. Sampat Raj Dugar,** 1992(58) ELT 163(SC), wherein the view taken in **East India Commercial Company Limited's** case (supra) was followed. The said view was also followed by the Bombay High Court in **Taparia Overseas (P) Limited v. UOI,** 2003161) ELT 47, **K.Uttamlal (Exports) Pvt. Limited v. UOI,** 1990(46) ELT 527 and Allabad High Court in **Coolade Beverages Limited v. Commissioner of Central excise, Meerut,** 2004 (172) ELT 451 and **H.Guru Investment (North India) Pvt. Limited v. CEGAT, New Delhi,** 1998 (104) ELT 8.

Learned counsel for the revenue relied upon judgment of the Calcutta High Court in **ICI India Limited v. Commissioner of Customs (Port), Calcutta,** 2005 (184) ELT 339 and judgment of this Court dated

22.12.2005 in **Golden Tools International v. Joint DGFT, Ludhiana,** 2006(199) ELT 213, wherein this court upheld cancellation of DEPB and levy of penalty under section 11(2) of the Foreign Trade (Development and Regulation) Act, 1992. This court observed:-

> "12. We are of the view that both the petitions are bereft of any merit. The entire claim of the petitioners was based on falsehood. It is not in dispute that furnishing of bank certificate of exports and realisation of export proceeds was a pre-requisite for issue of DEPB. Admittedly, the bank certificates furnished were fabricated documents. The observations of the former Lord Chief Justice of England, Sir Edward Coke, more than three centuries ago, that "fraud avoids all judicial acts, ecclesiastical or temporal", noticed by the Supreme Court in S.P.Chengalvaraya Naidu v. Jagannath, AIR 1994 SC 853, are apt for the instant case. The Apex Court has also observed that an act of deliberate deception with the design of securing something by taking unfair advantage of another is a "fraud". "Fraud" is a cheating intended to get an advantage. A person whose case is based on falsehood has no right to seek relief in equity. Recently in Commissioner of Customs v. Essar Oil Ltd., (2004) 11 SCC 364, their Lordships of the Supreme Court have observed that it is a fraud in law if a party makes representations, which he knows to be false, and injury enures therefrom although the motive from which the representations proceeded may not have been bad. Therefore, at the outset, we reject the stand of the petitioners that since the goods were in fact, exported, and the proceeds were realised, no contumacious conduct could be attributed to them and perhaps it was a misadventure on the part of their representatives. It does not matter whether the forged certificates were furnished by the petitioners or their representatives. What is material is that representations were made to the Directorate of Foreign Trade either by them or on their behalf; the Joint Director of Foreign Trade acted on these representations and issued the DEPBs. The petitioners were fully aware that remittances had not been received, through the bankers whose certificates had been furnished. It clearly shows the fraudulent motive. Being the ultimate beneficiaries of the DEPBs, they cannot be heard to say that they are innocent.

13. There is no substance in the plea that a DEPB cannot be cancelled after it has outlived its life. Sub-section (4) of Section 9 of the Act, confers upon the Director General or the authorized officer power to suspend or cancel any licence granted under the Act. Suspension is an interim measure, pending passing of a final order, but cancellation envisages annulment, a complete abolition of the right for the exercise of which a licence is granted. The power to suspend or cancel the licence vested in the Director General is determined by reference to the language used in the Statute and not by reference to any predilections about the legislative intent. We are unable to read into Section 9(4) of the Act anything which would indicate that expression "cancel" means only revocation of a licence which is otherwise valid and operative and that too retrospectively. In our opinion, the power to cancel a licence includes cancellation of both, whether unutilised or utilised.

14. True, the cancellation of a licence entails severe consequences but in a case, like the present one, where the claim at the threshold was based on a forged document, in absence whereof an application for issue of DEPB was not maintainable, cancellation of the pass books cannot be said to be a harsh punishment, disproportionate to the malfeasance committed, as is sought to be pleaded on behalf of the petitioners. We do not find any equity in favour of the petitioners.

15. As regards the applicability of the provisions of sub-section (2) of Section 11of the Act, it will be useful to refer to Section 3 of the Act, which confers power on the Central Government to make provisions relating to imports and exports. The section reads as follows:

> "**3. Powers to make provisions relating to imports and exports.-** (1) The Central Government may, by Order published in the Official Gazette, make provision for the development and regulation of foreign trade by facilitating imports and increasing exports.
>
> (2) The Central Government may also, by Order published in the Official Gazette, make provision for prohibiting, restricting or otherwise regulating, in all

cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the Order, the import or export of goods.

(3) All goods to which any Order under sub-section (2) applies shall be deemed to be goods the import or export of which has been prohibited under Section 11 of the Customs Act, 1962 and all the provisions of that Act shall have effect accordingly."

Sub-sections (1) and (2) are aimed at facilitating imports and increasing exports by conferring upon the Central Government power to issue orders in the Official Gazette, regulating, prohibiting or restricting in all cases or specified classes of cases, the import or export of goods. The object and purpose of sub-section (3) is to apply the prohibitions imposed under Section 11 of the Customs Act, 1962 to all goods to which any order under sub-section (3) applies and thereby to apply all the provisions of the Customs Act to the said goods. The provisions of sub-section (3) and the orders passed thereunder have to be read in conjunction with the provisions of the Customs Act, 1962 which form an integrated whole. In other words, the provisions of the Customs Act, 1962 would apply by reason of the operation of legal fiction created by Section 3(3) of the Act to all imports and exports made under any provision notified under the Act.

16. In the instant case, the stand of the respondents in the written statement is that the imports made by the petitioners were cleared without payment of customs duty on the basis of duty credit allowed in the DEPBs issued under the Act, which were obtained on the basis of forged bank realisation certificates. This factual averment has not been controverted by the petitioners. In the light of this factual scenario, reading the provisions of the said two Statutes conjointly, Section 11(2) of the Act would be clearly attracted. We are of the considered view that duty free imports made by the petitioners on the basis of DEPBs', fraudulently obtained, is

> tantamount to contravention of the provisions as engrafted in Section 11 of the Act and thus, no fault can be found with the orders levying penalties under the said Section."

We have considered the rival submissions and perused the record.

The Tribunal has not recorded any finding that the respondent-assessee did not commit any fraud, as alleged. Correctness of the finding that the transferee M/s Shiraj International Company Limited did not commit any fraud, having obtained DEPB without notice of the fraud, is not in question. Merely because penalty has not been imposed on the transferee on that ground, it is no ground to treat the respondent at par with the said transferee. The original allottee has to be accountable under the law for committing fraud and also for its consequences. The order of the Tribunal, amounts to treating innocent and guilty at par. Guilt of the respondents stands established and consequences thereof have to follow. The respondent has, thus, been held liable for illegal import as a result of wrongful act of the respondent. Judgments relied upon do not support the case of the respondent and are only in support of an innocent transferee, who may not be aware of fraud, which principle cannot be extended to the respondent against whom finding of fraud has been duly recorded, which has not been set aside or which has not been shown to be illegal.

In **Delhi Development Authority v. Skipper Construction Company ()P) Limited**, AIR 1996 SC 2005, the Hon'ble Supreme Court considered the concept of resulting trust and equity. It was held that where a person earned properties by smuggling or other illegal activities, all such properties whether standing in his name or in the name of his relations or associates will be forfeited to the State. Though, the question herein is not of forfeiture of property illegally acquired but on parity, a person committing fraud is required to restore the benefits taken and cannot be heard to say that since the benefit was transferred to an innocent person and since an innocent person cannot be punished, such a person should also be exonerated.

In view of the above reasons, the questions have to be answered in favour of the revenue and against the assessee.

In view of our above conclusion, these appeals are allowed, the impugned order of the Tribunal is set aside and the order of the adjudicating authority is restored.

(Adarsh Kumar Goel)
Judge

November 7, 2006
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(Rajesh Bindal)
Judge